

<sup>1</sup> E. L. Lee Kinch of Wichita, Kansas, was appointed to serve as a pro tem in this matter in place of former Board Member Carol Foreman.

found claimant failed to prove his alleged accident arose out of and in the course of his employment with respondent for two reasons; namely, claimant had abandoned his work duties when the accident occurred and the injury occurred during an activity of day-to-day living. Consequently, the ALJ did not reach the other issues raised in the claim.

Claimant maintains he injured his low back on January 28, 2009, from lifting and moving boxes and equipment while preparing for a business trip. Moreover, claimant contends respondent received timely notice of the accident as he telephoned his supervisor, Sean Sharpe, on February 4, 2009, and left a voice mail message that he had been injured on the alleged date. In addition, claimant asserts that his domestic partner, Denise Blessman,<sup>2</sup> notified respondent of his accident when she telephoned respondent's human resources generalist, Alia Wilson, on January 28, 2009, and left a message that claimant had injured himself lifting boxes while readying for a business trip. Furthermore, claimant argues he provided respondent with timely written claim for compensation as the period for making written claim was extended to one year due to respondent's failure to file an accident report with the Division of Workers Compensation.

In short, claimant requests the Board to award him temporary total disability benefits, medical compensation, and a 50 percent permanent partial general disability for the alleged January 28, 2009, accident.

Respondent contends the May 10, 2010, Award should be affirmed. Respondent not only requests the Board to affirm the ALJ's findings that claimant's accident did not arise out of his employment, but respondent also requests the Board to find that claimant failed to provide timely notice of the alleged accident and make timely claim for compensation. According to Mr. Sharpe, the voice mail message that claimant left in early February 2009 indicated that claimant had left the hospital but the message did not mention why claimant had been in the hospital in the first instance. And Ms. Wilson denies that she received a January 28, 2009, voice mail message from Ms. Blessman. Finally, respondent maintains it did not receive notice of the alleged January 28, 2009, accident until October 2009, when claimant filed an Application for Hearing with the Division of Workers Compensation.

The issues before the Board on this appeal are:

1. Did claimant injure his low back on January 28, 2009, in an accident that arose out of and in the course of employment with respondent?

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<sup>2</sup> Claimant referred to Ms. Blessman as his wife. Ms. Blessman indicated there may be a question about whether they were married.

2. Did claimant provide respondent with both timely notice of the accident and timely written claim for compensation? If so,
3. What is claimant's average weekly wage?
4. What period, if any, is claimant entitled to receive temporary total disability benefits?
5. What is the nature and extent of claimant's injury and disability?
6. What medical compensation, if any, is claimant entitled to receive?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the parties' arguments, the Board finds and concludes the May 10, 2010, Award should be affirmed as the evidence fails to prove that claimant provided respondent with timely notice of his accident, which is required by K.S.A. 44-520.

As indicated above, claimant alleges he injured his low back on January 28, 2009, while moving boxes readying for a business trip. On that date he experienced severe back pain and was taken by ambulance to St. Luke's South Hospital where he reported that he had been moving boxes. Claimant, who worked for respondent as a market development manager, described the incident as follows:

After I had gotten things set up so that when I got the car, I could go on ahead and load everything into the rental car -- I was walking to go get dressed and all of a sudden I had shooting pain just basically through my whole body and back. And also at that time it was so severe -- I put my hand against the wall; I couldn't even move. And I started tearing . . . and I called for my wife and asked her to call 911.<sup>3</sup>

The hospital notes from that date also address claimant's earlier back problems. Those notes state in pertinent part:

This pleasant male was moving boxes today and he was ready to go out of town and he noted severe back pain that was unremitting and unrelenting. It did radiate down his hamstrings to the knees, and on the left side he actually felt some pain and some tingling in the left dorsum of his foot. . . . The patient actually has had back pain dating back to approximately one month ago when he slipped on the ice and was ready to fall and he caught himself on a rental car. He caught his hands on the trunk when he was about to fall. This caused a twisting sensation and he

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<sup>3</sup> Banks Depo. at 66.

had some severe back pain from this. Over the past many years, he has had episodes of back pain including one relating to a car wreck. He has also had some when he used to be a professional tennis player. He states in December he went in to Dr. Kopp and states that he had cortisone injection in his back at that time. . . .<sup>4</sup>

The incident of claimant slipping on ice and catching himself on the rental car is the subject of Docket No. 1,044,741, which the parties agree is not being appealed. Therefore, the appeal in Docket No. 1,044,741 is dismissed.

Following the accident claimant has been diagnosed as having a herniated disc in his low back at the L5-S1 level. He has not worked since the alleged January 28, 2009, accident and he has been terminated from respondent's employment. He has incurred more than \$45,000 in medical expense.

### **Notice of the accident**

Claimant was admitted to the hospital on January 28, 2009. He testified that while in the hospital respondent's human resources department contacted him to see how he was doing and spoke with him about medical certification for being in the hospital.<sup>5</sup> He also testified that after leaving the hospital he left a message for Sean Sharpe, his field supervisor, that he had injured himself getting ready to go to St. Louis. Claimant testified, as follows:

Q. (Mr. Stein) Okay. Now, after January 28, 2009, did you talk to or leave any messages with anybody at BDS about your second accident?

A. (Claimant) Yes. HR called me while I was in the hospital to see how I was doing and they said that when I got home, that they wanted to talk with me about getting things set up for my forms, if I needed medical certification for me being in the hospital. And then I also left a voice[ ]mail with Sean Sharpe, who's the field supervisor, and also he stated to just send him another ELF form, which is an investigation form that we have to fill out.<sup>6</sup>

Claimant believed he left the voice mail message to Mr. Sharpe on February 4, 2009, and that it entailed the following:

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<sup>4</sup> R.H. Trans., Cl. Ex. 2.

<sup>5</sup> *Id.*, at 14.

<sup>6</sup> *Id.*, at 14, 15.

I basically encompassed everything that had happened, that I had gotten injured getting ready to go to St. Louis and that I had my wife call in to work also, and that I was out of the hospital. Because he had also wanted me to give him a call, too, when I got out of the hospital.<sup>7</sup>

But Mr. Sharpe denies that claimant's voice mail message notified him of the January 2009 incident. Mr. Sharpe testified the message merely indicated that claimant had been in the hospital and that he was heading home.<sup>8</sup> On February 4, 2009, Mr. Sharpe sent an e-mail to claimant requesting an "ELF for the time you are away."<sup>9</sup> Neither that e-mail nor one from Mr. Sharpe dated February 6, 2009, mention that claimant had sustained a work-related accident. In fact, the former e-mail advised claimant that he had a few hours left for vacation that could be applied to this absence. In short, Mr. Sharpe maintains that claimant never notified him of the January 2009 incident.

Claimant also testified that on the day of the alleged accident he requested Ms. Blessman to call and cancel the rental car that had been reserved for his intended business trip and to call work and advise what had happened. Claimant admits he did not observe her make the calls.<sup>10</sup> Ms. Blessman contends she telephoned Alia Wilson, who works in respondent's human resources department, from a hospital telephone and left a message on Ms. Wilson's voice mail that claimant had "injured himself while lifting boxes to get ready for an out of town trip" for respondent.<sup>11</sup>

But Ms. Wilson, whose job duties include processing and overseeing workers compensation claims for respondent, testified that in early January 2009 claimant reported his December 2008 accident but that neither claimant nor Ms. Blessman ever reported the January 28, 2009, incident to her. Ms. Wilson is certain that Ms. Blessman did not leave a voice mail as it is not recorded on the voice mail log that Ms. Wilson maintains. Ms. Wilson acknowledged that she received a voice mail from claimant on January 29, 2009, that indicated he was in the hospital for an MRI on his back, which Ms. Wilson presumed was related to his December 2008 accident. She also presumed a February 26, 2009, e-mail message from claimant referencing an injury from work concerned his December 2008 accident. That e-mail from claimant to Ms. Wilson read as follows:

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<sup>7</sup> *Id.*, at 15.

<sup>8</sup> Sharpe Depo. at 14.

<sup>9</sup> *Id.*, Ex. 3.

<sup>10</sup> Banks Depo. at 68.

<sup>11</sup> Blessman Depo., Ex. 1.

I have read the info and understand most of it. But, I will check on the portions that I need inquiry or answers for. Am I to understand that even though this injury was caused and happened doing my job for BDS, your [sic] stating that I just took off work, of my own volition and have jeopardized [sic] my job, even though it happened in the course of fulfilling [sic] the job, to completion?

I have talked with Dr. Kopp[']s office and they are wanting me to see a neurologists [sic] and I have a meeting with him on the 3/3/09 to fill out papers etc...Plus I have a meeting with Dr. Laughlin om [sic] Monday March 9,[ ]2009 to decide on surgery or not. I think it would be best to send all info that could, would or should affect an associate in this position so that there are no surprises in reference to lost [sic] of job et[ ]al.<sup>12</sup>

According to Ms. Wilson, claimant was off work the week before January 28, 2009, for personal, unknown medical reasons.

Petra Feters, respondent's human resources director, testified she is aware of every work-related injury reported to Ms. Wilson as she is Ms. Wilson's direct supervisor and they are in continuous communication throughout the workday. According to Ms. Feters, she was not aware that claimant was alleging a second work-related injury until late 2009 when respondent's attorney divulged that information.

Claimant's first attorney in this claim, James E. Martin, wrote respondent on both March 9 and March 17, 2009. Those letters, which were sent by certified mail, notified respondent that Mr. Martin had been retained to represent claimant in his workers compensation claim. Both letters referenced claimant's December 21, 2008, accident. Neither letter referred to the alleged January 28, 2009, accident. The initial Application for Hearing filed with the Division of Workers Compensation in March 2009 only mentioned the December 2008 slip and fall incident. It was not until October 29, 2009, that an Application for Hearing was filed with the Division of Workers Compensation for the alleged January 28, 2009, accident.

The Workers Compensation Act requires that notice be given to an employer of accidents and injuries that occur at work. K.S.A. 44-520 provides:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice

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<sup>12</sup> Wilson Depo., Ex. 4.

unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The Board finds respondent did not receive notice of claimant's January 28, 2009, accident within 10 days of the alleged accident. Likewise, the evidence fails to establish that respondent received notice of the accident within 75 days. The testimonies of Mr. Sharpe, Ms. Wilson, and Ms. Feters are persuasive, especially in light of the March 2009 Application for Hearing, Mr. Martin's March 2009 letters that did not mention a late January 2009 incident, and the notable absence of reference to a January 28, 2009, accident in the e-mail messages between claimant and respondent's agents.

In summary, as the record does not establish the required element of timely notice, claimant's request for benefits must be denied. Accordingly, the remaining issues set forth above are rendered moot.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>13</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board affirms the May 10, 2010, Award entered by the ALJ that denied claimant's request for benefits for reasons other than those expressed by the ALJ.

**IT IS SO ORDERED.**

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<sup>13</sup> K.S.A. 2009 Supp. 44-555c(k).

**REGINALD BANKS, SR.**

**DOCKET NOS. 1,044,741 & 1,048,067**

Dated this \_\_\_\_ day of December, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Thomas Stein, Attorney for Claimant  
David J. Roberts, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge